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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

GULF-CANAL LINES, INC., COMMERCIAL TRANSPORT CORPORATION, VALLEY LINE SUPPLY AND EQUIPMENT COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., AMERICAN COMMERCIAL BARGE LINE COMPANY; corporations,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division.

BRIEF OF APPELLANTS AND AMICUS CURIAE IN OPPOSITION TO MOTION TO AFFIRM

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This brief in opposition to the motion to affirm filed by the United States and the Interstate Commerce Commission (government) is submitted jointly on behalf of the appellants herein and the Waterways Freight Bureau, *amicus curiae.*

ARGUMENT.

1. The Commission holds that the three-commodity condition to the application of the section 303(b) exemption

is not met where any non-bulk is carried, *i.e.*, it adds a "no mixing condition" to that exemption. The motion supports a "no mixing condition" not by reference to the words or purpose of section 303(b), but by the claim that this Court has sustained a "no mixing condition" and Congress has not seen fit to overrule it.[1]

This Court did not sustain a "no mixing condition" in *Commercial Barge Lines* v. *United States*, 166 F. Supp. 867 (E.D. Mich.), affirmed *per curiam*, 359 U.S. 342 (1959). The issue before the Commission in the case there reviewed was not the validity of a "no mixing condition," but whether such an assumed condition precluded towing non-bulk commodities exempt under section 303(f)(2) (because performed for a certificated carrier) by a carrier claiming the bulk exemption for its own bulk freightage. The appropriateness or validity of a "no mixing condition" was never questioned or assailed and, therefore, never defended or argued.[2] The Court can hardly be said to

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[1] The only suggestion of a substantive argument for a "no mixing condition" is the claim that it "is analogous to its [the Commission's] construction of the agricultural-commodities exemption under Part II of the Act . . . ". (Mot. 4 note 5) But the Commission's "construction" of the agricultural exemption is required by explicit language limiting that exemption to transportation where "such motor vehicles are not used in carrying any other property." (49 U.S.C. section 303(b)(6)). There the Commission has merely implemented the express will of Congress; here it has added a condition which Congress did not choose to include.

[2] The "Question Presented" before this Court was stated as follows in the Jurisdictional Statement filed by appellants in that case. (No. 721 O.T. 1958 J.S. p. 3):

> Has the Commission unlawfully extended its jurisdiction under Part III of the Act by holding inapplicable the § 303(b) exemption to the transportation of three or less bulk commodities when the tow operator renders incidental towage for a certificated water carrier, exempt under § 303(f)(2), in the same tow.

have decided an issue which was neither framed nor argued before it.

Lacking support for a "no mixing condition", the government is driven to the tenuous argument that it must be so, because Congress has not yet seen fit to say it isn't so, or shouldn't be so. This enactment-by-silence doctrine has seldom been relied upon and never been accepted as independently dispositive by this Court. *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 140 (1941); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

If this motion is granted, the Commission will have succeeded in imposing a doubtful construction of an important section of the Act upon an industry united in its opposition to that construction, without ever once having defended it. More important, the most significant issue affecting the scope of water carrier regulation will have been decided by default, and the Commission's unsupported and unexplained construction will be permanently appended to the regulatory structure, without ever having been fully considered by this Court.

If, as we insist, a "no mixing condition" is invalid, there is no occasion for deciding the correctness of the Commission's interpretation thereof, and appellants' second and third contentions become moot.

2. Assuming *arguendo* that section 303(b) imposes a "no mixing condition", the question then is: Does a noncertificated bulk carrier lose *its* section 303(b) exemption when a certificated tower employed by it elects to tow the bulk in a "mixed" tow. The government claims that the bulk carrier may not employ such regulated towing services without forfeiting its exemption, on the ground that otherwise the Act's regulatory requirements—restricted entry, publishing and filing of rates, and ob-

servance of tariff rates—would be "circumvented" through "manipulation of the bulk-commodity exemption" (Mot. 6). The claim so phrased is presumably induced by the Commission's use of the word "device" in describing the arrangement here involved (Mot. 3). But, in 1955, the Commission found an attack upon a certificated tower's right to tow for bulk exempt carriers "without merit", after considering pleadings including a full description of the history and importance of the practice. *American Barge Line Co., Petition for Declaratory Order*, 294 I.C.C. 796 (1955) (J.S. 18 and App. 9, 16)

The government does not here explain, nor did the Commision in its present report explain, how or why a once-lawful practice must now be viewed as a "device". The insinuation that there is something devious in the continuation of a long-standing Commission-approved practice, only serves to underscore the importance of the questions presented and the necessity for final judicial resolution of the "conceptual discrepancies and undulations" which the district court found in the Commission's decisions related to those questions. (J.S. App. 13)

No individual or group has any greater concern for or stake in the integrity of water carrier regulation and outstanding certificates than the Waterways Freight Bureau, whose membership accounts for nearly all regulated carriage on the Mississippi River system. In the face of the now-uniform position of certificated barge lines, and the silence of other interests, it may appropriately be asked: "Whom is the Commission here protecting, from what possible injury?" The inland water carrier industry asks only that it be permitted to continue to enjoy the manifest operating efficiencies resulting from the now-disputed prac-

tice. The shipping public can only benefit from the continued realization of transportation economies too clear and substantial to be questioned by the government.[3]

3. The government ignores the thrust of this Court's ruling in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947). It argues that the impairment of these carriers' towing certificates caused by the Commission's ruling is merely the result of the "implicit condition . . . that they operate within the requirements of the Act." (Mot. 7 note 8) But, assuming the Commission's power to limit operations under certificates by a reasonable and uniform construction of the Act, can it further be assumed that the Commission may first confirm and years later deny a right which prudent businessmen were entitled to regard as vested, without more compelling justification than has been offered here? This is a substantial question vitally affecting the inland water carrier industry.

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[3] The government's final assertion on appellants' second contention is referenced to several freight-forwarder cases. (Mot. 6 note 7) Since we read those cases as supporting appellants, it appears that the government may have misconceived appellants' position. The bulk-exempt carrier retains the bulk exemption not because the certificated tower is regulated (in consequence of *its* manner of towing) but because the bulk carrier has done nothing to nullify its claim to the bulk exemption. This view is supported by the cases cited by the government which hold that the status of the person assuming the transportation obligation (the bulk affreightment carrier here) is not determined by the status (regulated or exempt) of the underlying carrier (the certificated tower) engaged to perform some portion of the service. Cf. *Movers' & Warehousemen's Assn. of America, Inc., Petition* 304 I.C.C. 517, 519-520 (1958).

CONCLUSION.

The questions presented are substantial and this Court should note probable jurisdiction.

Respectfully submitted,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 947. Decided March 20, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.